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ABSTRACT

For nearly half a century, the Federal Communications Commission (FCC) has been exercising its authority to grant and deny applications for broadcast licenses. In the process of comparison used by the FCC to assess qualified new applicants, two considerations weigh heavily: (1) the best practicable service to the public, and (2) maximum diffusion of control of the mass communications media. Sometimes comparative hearings play a vital role in the Commission's efforts to consider such substantive criteria as ownership and ownership diversity. However, since the comparative hearings have proven to be neither an effective nor an efficient administrative procedure for choosing among qualified applicants, the United States Congress has authorized the FCC to use a lottery approach, a system of random selection. For the system to include underrepresented owners, the Commission could assign a particular, though arbitrary, preference to those applicants or the Commission could choose to assess the degree of each minority applicant's lack of representation and assign a preference factor to each minority applicant. The latter approach would accommodate differences among minority applicants. Nevertheless, as efficient as a lottery may be for allocating a license or permit, its effectiveness at securing the best practicable service or promoting ownership diversification--the two standard comparative issues--is suspect. Any system of random selection limits the Commission's discretion and inevitably leaves important decisions and choices to chance. (HOD)

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RANDOM ALLOCATION OF LICENSES AND THE PUBLIC INTEREST IN OWNERSHIP DIVERSITY

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RANDOM ALLOCATION OF LICENSES AND THE

PUBLIC INTEREST IN OWNERSHIP DIVERSITY

For nearly half a century, the Federal Communications Commision has been exercising its authority to grant and deny applications for broadcast licenses. Mandated by Congress to identify applicants who will best serve "the public interest, convenience, and necessity,"[1] and required by the Supreme Court to afford competing applicants a reasonable opportunity to present their best case,[2] the Commission has sought to "develop a procedure by which to identify the competitor of superior promise, and inform that procedure with substantive criteria."[3] Thus emerged "comparative hearings," what the Court of Appeals in 1949 described as an essentially adversary procedure.[4]

In the process of comparison used by the FCC to assess qualified new applicants, two considerations weigh heavily: (1) the "best practicable service to the public" and (2) "maximum diffusion of control of the media of mass communications."[5] Of all the factors the FCC may consider when choosing among competing applicants, the latter--ownership diversity--stands out as one of the most important; from the Commission's perspective, it "constitutes a primary objective" in the allocation of licenses.[6] Indeed, since ownership diversification in general is viewed as a desirable goal, the distribution of licenses may well rest on the FCC's understanding of--and concern for--the pattern of ownership among all mass media, not broadcast media alone. It is not "inconsistent with the statutory scheme," the Supreme Court observed in 1978, "for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole."[7]

If comparative hearings play a vital role in the Commission's efforts to consider such substantive criteria as ownership and ownership diversity, they have nonetheless failed to insure procedural fairness and administrative efficiency; too often the hearings themselves became "a smokescreen for dilatory tactics and procedural abuses."[8] Accordingly, at the FCC's urging, the 97th Congress has authorized the Commission to grant initial licenses or construction permits "through the use of a system of random selection."[9]

Thus after several decades of comparative hearings, the FCC may now use a lottery for purposes of choosing among qualified applicants. This paper focuses on the likely impact of a lottery approach on the Commisssion's expressed commitment to ownership diversification. Our objective is threefold: first to examine the failure of the Ashbacker doctrine, which established the need for comparative hearings; second, to explicate the logic of the FCC's lottery; and third, to assess the likely consequences of a lottery for what Congress calls "underrepresented" owners of "telecommunications facilities."[10]

Obtaining A Broadcast License

Applicants for radio and television station licenses must proceed through several stages. First, an applicant is required to find a vacant channel, either through an engineering study (for A.M. radio) or with the assistance of the FCC's Table of Assignments.[11] Assuming a channel is available, the applicant must demonstrate to the Commission's satisfaction that he/she fulfills various citizenship, character, technical, and financial requirements.[12] In short, the Commission requires a showing that applicants:

(1) have not been convicted of serious crimes, (2) are U.S. citizens, (3) have not violated (or are not violating as a result of the granting of the license in question) FCC limits on broadcast station ownership or network affiliation, (4) can afford to build and operate the said station, and (5) will be broadcasting a signal that will not cause unacceptable levels of interference with other spectrum users. Assuming those conditions are met, applicants are evaluated with respect to the degree to which their proposed programming and operations will serve the public interest, convenience, and necessity. Generally, applicants meeting the basic citizenship, character, technical, and financial qualifications, whose applications are not opposed by parties petitioning the FCC, face a rather efficient licensing procedure. When initial license applicants are opposed, the procedure becomes burdensome for all involved.

The Comparative Hearing

> When two or more applicants file at about the same time for use of the same broadcast facility, or for facilities that would interfere electronically with each other, their applications are said to be mutually exclusive. The Commission may not simply grant the first to be filed by a qualified applicant, but [has been required to] accord a consolidated hearing to all such applicants, and choose the one that will best serve the public interest. This is the celebrated comparative proceeding.[13]

The necessity for holding comparative hearings in cases of mutually exclusive license applications was affirmed by the Supreme Court in Ashbacker

Radio v. FCC.[14] Where two or more applicants qualify for mutually exclusive facilities, the Commission has been required to base its award of the license on supplementary criteria. Those criteria were to reflect public interest values, but until 1965 remained unspecified. In 1965, after toiling with onerous comparative hearings, the Commission issued its "Policy Statement on Comparative Broadcast Hearings."[15] In it the FCC referred to the hearings as "commonly . . . extended" and "inherently complex."[16] The Commission further noted that while each set of comparative circumstances was unique and involved "almost infinitely variable" factors, it would use the Policy Statement to outline general criteria it would employ in comparative cases.[17]

Constituting "a primary objective in the licensing scheme," "diversification of control of the media of mass communications" was listed as the first distinguishing criterion. This would be evaluated with preference given to applicants who did not already own any or many media outlets, particularly in the area reached by the broadcast license in question. Preference would be given to applicants who integrated local ownership and control of the broadcast station. Significantly superior proposed program service (generally as measured against the FCC's 1960 en banc Programming Statement, 20 Pike and Fischer, Rad. Reg. 1901) and significantly superior previous broadcast station operations would be recognized and considered worthy of comparative advantage. "Efficient use of the frequency," "character," and "other factors" would also be subject for comparison.[18]

These standards, especially when preceded with the caveat that each comparative situation was unique, add little to the certainty or efficiency of comparative proceedings. Worthy of note are the criticisms of the FCC's comparative hearing process--both before and after the 1965 Policy Statement.

Critics focus on the inordinate delays (and accompanying expenses), the arbitrariness of the necessarily subjective decision-making process and the failure to explicate the stated concerns regarding ownership diversity. Former FCC Commissioner Robinson wrote:

> "According to many critics, the central problem of the broadcast licensing process has been the FCC's inability to develop clear and meaningful selection criterion . . ., particularly in choosing among competing broadcast applicants. The absence of standards has yielded confusing and inconsistent results as well as inefficient procedures. It also may have contributed to improprieties because the absence of clear, rational standards for influencing the licensing decision provided a fertile bed for the gestation of other forms of influence.[19]

Chief judge of the U.S. Court of Appeals (D.C. Circuit) Bazelon similarly opined that the FCC's comparative hearings are "flawed and arbitrary . . ." ". . . and my view is that the comparative hearing process in the FCC is at present seriously flawed due to lack of standards."[20] Other testimonials to the administratively flawed comparative hearing process include the following.

> "For inefficiency and highly questionable use of the adjudicating process, it is difficult to find a rival to the comparative hearing in a radio or television case."[21]

> "[T]he standard comparative broadcast hearing involving new applicants . . . is, in a nutshell, long, complex, and unsatisfactory."[22]

"[T] he purported criteria for making choices among competing applicants [are] . . . relevant . . . but they are unfortunately extremely imprecise, and they are capable of infinite manipulation. They can become - and, in my opinion, the record shows they have become - spurious criteria, used to justify results otherwise arrived at."[23]

"There has been a tendency [on the part of applicants subject to comparative hearings] to engage in 'puffing' or 'window dressing' . . . . The comparative contest has also led to an emphasis on minutiae and to an overlong hearing record."[24]

"The inefficiency and complexity of the hearing and decision process make the comparative proceeding needlessly slow and expensive. The comparative case is costly in terms of the disproportionate amounts of time that must be devoted to it by the Commission and its staff. And it can be enormously expensive for applicants, who must raise large sums to prepare and litigate their applications. The long periods required for hearing and decision delay the time when the station can be built and put on the air to serve the public."[25]

What is striking in the literature is the unanimity with which the FCC's comparative hearing process for mutually exclusive initial applicants is negatively assessed. This negativity, it should be noted, generally focuses on the inefficient or arbitrary nature of the process and does not necessarily imply fault with the Commission's stated ends.[26] At issue here is not the Commission's expressed goals of best meeting the public interest as a result of an open hearing and deliberation process. Rather, the discussion focuses on the success of the hearing process.

The hearing system is costly and time consuming. It has been estimated that the cost to each applicant in comparative hearings averages between $300,000 and $500,000.[27] Comparative cases often take years to complete.[28] The resulting workload for the Commission is onerous. One observer noted "that in fiscal 1961 grants in comparative cases comprised 1.2% of all major broadcast authorizations, but consumed 39.7% of the workload of examiners in broadcast cases . . . ."[29] Pike and Fischer's Radio Regulation fills many hundreds of pages simply digesting FCC and court cases in this area since 1963.[30]

That potential broadcasters, the FCC, and the public may spend large amounts of time and money involved in comparative hearings for mutually exclusive initial broadcast license applications is not in itself an indictment of the process. If, as a result of this process, the public interest goals of the Commission are being met, it might well be worth the administrative cost.

The Comparative Process and the Goal of Ownership Diversity

The FCC has several specific rules proscribing particular practices of media ownership concentration.[31] License applicants in violation of

these rules do not succeed in, indeed do not often get to, comparative hearings for license assignment. In choosing among those applicants that do not violate multiple ownership rules, the FCC looks to its 1965 Policy Statement in which it noted that ownership diversity would be "of primary significance" in preferring one applicant over another.[32] Just what "ownership diversity" or "of primary significance" means remains a mystery. Debates on media concentration have focused, for example, on permissible thresholds of media ownership.[33] There has been similar concern regarding the definition of minority group ownership and control of potential licensees.[34] Former Commission Chairman Wiley, in his dissent in Cowles (a comparative renewal case) noted his frustration regarding the implementation of the 1965 Policy Statement. He was plagued, as others have been, with questions about which ownership/control situations deserve "merits" or "demerits," and by questions regarding the power of those "merits" or "demerits" vis-a-vis other important public service criteria.[35]

"The problem" Wiley states, is that the 1965 standards

> concerning diversification and integration advance no public purpose to which the agency is truly committed and, if implemented in a rigorous fashion, could well have a serious destabilizing effect on the broadcast industry to the detriment of the . . . public.
>
> . . . . . .
>
> [W]e are left with a situation in which objective criteria are unreliable (and really useless) in predicting future behavior of licensees, and subjective criteria - while clearly relevant - are not susceptible to administrative evaluation.[36]

Wiley's frustrations must have been echoed by Central Florida Enterprise, Inc. when, in a comparative hearing, it was deemed by the Commission to have a "clear advantage" in the diversification criterion over its competitor (Cowles Broadcasting, Inc.). That "clear advantage" was translated by the FCC as giving Central a "clear preference." The Court of Appeals noted, however that

> the Commission found that the significance of the "clear preference" was reduced by several factors and that, in the end, the preference was "of little decisional significance."
>
> We fail to see how a "clear preference" on a matter which the Commission itself has called a "factor of primary significance" can fairly be of "little decisional significance." We should have thought the relevance of unconcentrated media ownership to the public interest inquiry was well settled.[37]

Faulting the FCC for noting Central's clear advantage on the ownership issue while at the same time failing to be interested in it, the Court remanded the case to the Commission.[38] In June, 1981, the Commission reaffirmed its earlier decision while, at the same time, it was more expanisve in its reasoning.[39] That case, it pointed out, involved a renewal application. The Commission reaffirmed its policy giving "primary importance" to "structural factors such as integration and diversification . . . in a new license proceeding," but suggested that such a preference be given "lesser weight" in renewal situations.[40]

While it would be unfair to attribute it to the FCC's comparative hearing procedure for initial applicants, the percentage of group-owned television stations increased steadily between the 1950's and 1970's. 1977 figures indicate a high degree of group and conglomerate ownership of television stations and, to a lesser degree, of radio stations.[42] The preeminance of conglomerate or chain-owned broadcast stations has not dwindled since the FCC designated that as one of its goals in the 1965 Policy Statement.

The Logic of a Lottery

Since comparative hearings have proven to be neither an effective nor an efficient administrative procedure for choosing among qualified applicants for an initial license or permit, Congress has authorized the FCC to use a lottery approach, a "system of random selection." Chapter Two of Title XII of the massive "Omnibus Budget Reconciliation Act of 1981" thus amends Section 309 of the Communications Act of 1934: "If there is more than one applicant for any initial license or construction permit . . ., then the Commission . . . shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.[43] Keenly aware of the importance of ownership diversification, Congress has qualified "random selection" by insisting that "groups or organizations, or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties will be granted significant preferences."[44]

Required by Congress to establish the "rules and procedures" for administering its lottery, the Commission must decide how to extend to

minority applicants--applicants who are "underrepresented in their ownership of telecommunications facilities"--what Congress calls "significant preferences." Although the FCC has the authority to require minority applicants to submit "such information as may be necessary to enable the Commission to make a determination regarding whether such applicants shall be granted such preference,"[45] the FCC itself must define "significant preference" and decide how to operationalize it. This section outlines two contrasting approaches.

Two Scenarios

To invent a system of random selection where underrepresented owners are granted significant preferences, the Commission has two broadly distinguishable options. Having identified the number of minority applicants for any given license or permit, the Commision could then assign a particular, though arbitrary, preference to those applicants. For example, if there are 36 "ordinary" applicants and 6 minority applicants, the FCC would grant a "significant preference"[46] to the latter by increasing each minority applicant's participation in the lottery to - or beyond - the point where the total number of minority applicants in the lottery (as opposed to the "real" number of minority applicants, which remains 6) exceeds the total number of "ordinary" applicants. Given 36 "ordinary" applicants and 6 minority applicants, each minority applicant would enter the lottery at least 7 times. In practice, there would now be 42 minority applicants versus 36 "ordinary" applicants; ergo, minority applicants - individually as well as aggragately-would have the advantage. Conceptually, this approach to a system of random selection would work as follows:

IF A = total number of applicants
O = total number of "ordinary" applicants
M = total number of minority applicants
PF = "Preference Factor" - the number of times minority applicants must participate in the lottery in order to create an overall advantage for minority applicants,

THEN

$$PF = \frac{O}{M} + 1^*$$

Given 36 "ordinary" applicants (O) and 6 minority applicants (M),

$$PF = \frac{36}{6} + 1$$

$$PF = 7$$

To compute the extent of the preference granted to minority applicants, or "Preference Gain" (PG), the Commission would calulate the difference between the ratio of "ordinary" applicants to minority applicants and the contrived or artificial ratio created by the Preference Factor. Thus,

$$PG = \frac{M}{A} - \frac{M(PF)}{O+M(PF)}$$

Given 36 "ordinary" applicants and 6 minority applicants,

$$PG = \frac{6}{42} - \frac{42}{36+42}$$

$$PG = \frac{6}{42} - \frac{42}{78}$$

$$PG = .39$$

*1 is arbitrary; it represents the extent of the preference extended to minority applicants.

Minority applicants in general, therefore, would have a 39 percent better chance of winning a license than the chance they would have had in a truly random selection process. To calculate the Preference Gain for the individual minority applicant (as opposed to the Preference Gain for minority applicants in general),

$$PG = \frac{1}{A} - \frac{PF_i}{O+M(PF)}$$

$$PG = \frac{1}{42} - \frac{7}{78}$$

$$PG = .066$$

The individual minority applicant, therefore, would have a 6.6 percent better chance of winning a license than the chance they would have had in a truly random selection process.

Alternatively, the Commission may choose to assess the degree of each minority applicant's "underrepresentativeness" and, in turn, assign a preference factor to each minority applicant. In contrast to the first scenario, where minority applicants were assigned the same preference factor, this approach accommodates differences among minority applicants. The implication here is that minority ownership is not a monolithic concept, that some underrepresented groups or organizations are more or less underrepresented than others. Although there are a variety of ways to distinguish between and among minority applicants, perhaps the least capricious method would involve rank-ordering minority applicants in descending order of "underrepresentativeness," such that the most underrepresented applicant would be given the greatest preference.[47] While this method does not guarantee the assignment of unique Preference Factors (because rank-ordering does not necessarily yield mutually exclusive categories), it would ensure at least gross distinction between, say,

a minority applicant who owned one telecommunications facility and an applicant who owned none.

Thus, given 6 minority applicants where two applicants are ranked together, the Commission would need to assign 5 Preference Factors:

Number of Applicants Per Rank (N)	Minority Applicants (M)	Preference Factor (PF)
1	M_1	PF_1
2	M_2, M_3	PF_2
1	M_4	PF_3
1	M_5	PF_4
1	M_6	PF_5

Since the least underrepresented minority applicant (M_6) deserves a "significant preference," and since the minimum Preference Factor for any minority applicant (given 36 "ordinary" applicants and 6 minority applicants) is 7, then

$$PF_5 = 7$$

Restricting ourselves to whole numbers in intervals of 1, the remaining Preferenc Factors would be:

$$PF_4 = 8$$

$$PF_3 = 9$$

$$PF_2 = 10$$

$$PF_1 = 11$$

Should the Commission find that the range of Preference Factors is too large, it could collapse two or more rankings into a single category. Conversely, should the range of Preference Factors appear to be too small, the Commission could increase the difference between Preference Factors (instead of 7,8,9,10, and 11, the Commission might assign 7,9,11,13, and 15).

To compute the Preference Gain (PG) for minority applicants collectively (aggregately), the Commission would calulate the difference between the ratio of "ordinary" applicants to minority applicants and the contrived or artificial ratio created by the five Preference Factors. If N is the number of minority applicants assigned a particular Preference Factor, then

$$PG = \frac{M}{A} - \frac{\sum PF_i N_i}{O + \sum PF_i N_i}$$

Given 36 "ordinary" applicants and 6 minority applicants,

$$PG = \frac{6}{42} - \frac{11(1) + 10(2) + 9(1) + 8(1) + 7(1)}{36 + 11(1) + 10(2) + 9(1) + 8(1) + 7(1)}$$

$$PG = \frac{6}{42} - \frac{55}{91}$$

$$PG = .46$$

Under this scenario, minority applicants collectively would have a 46 percent better chance of winning a license than the chance they would have had in a truly random selection process.

But since minority applicants have been rank-ordered and assigned different Preference Factors, it would be more meaningful to compute the Preference Gain for minority applicants respectively (individually):

$$PG_i = \frac{1}{A} - \frac{PF_{1,2,3}}{\sum_{i=1}^{n} PF_i N_i}$$

Just as there are five distinctive Preference Factors (in our hypothetical example), there will be five corresponding Preference Gains:

Minority Applicant	Preference Factor	Preference Gain
M_1	$PF_1 = 11$	$PG_1 = .100$
M_2, M_3	$PF_2 = 10$	$PG_2 = .090$
M_4	$PF_3 = 9$	$PG_3 = .077$
M_5	$PF_4 = 8$	$PG_4 = .064$
M_6	$PF_5 = 7$	$PG_5 = .053$

In the first scenario, each minority applicant had a 6.6 percent better chance of winning a license. In the present scenario, however, the advantage extended to minority applicants is expressed in terms of a range of percentages - from a 5.3 percent better chance for the least underrepresented minority applicant (M_6) to a 10 percent bettern chance for the most underrepresented minority applicant (M_1).

A Definitial Dilemma

Regardless of how the lottery itself might work, the Commission must answer four vital questions:

1. What constitutes a "significant perference"?
2. Who qualifies as a "qualified applicant"?
3. Who qualifies as an "underrepresented owner" of telefacilities?
4. What are "telecommunications facilities"?

The "significant preference" dilemma focuses on the difference between the actual ratio of minority applicants to "ordinary" applicants and the effective ratio of "minority applicants to "ordinary" applicants. In the scenarios discussed earlier, "significant preference" was defined as adjusting the effective ratio to the point where minority applicants outnumbered "ordinary" applicants. Technically, of course, any gain from the actual to the effective ratio of minority applicants to "ordinary" applicants would consistute a preference. But what would constitute a significant preference?

Will the Commission expand its criteria for distinguishing between qualified and unqualified applicants? What ownership criteria will be used to exclude applicants? Beyond the requirements set forth in Sections 310 (a) and 313 (b) of the Communications Act of 1934, will the FCC seek to further limit participation in the lottery by adopting more stringent qualification standards?

Probably the most difficult questions involve definitions of "underrepresented owners" and "telecommunications facilities." What evidence will the Commission accept on behalf of applicants who claim "underrepresented" status? Also, why must minority applicants be groups or organizations, or members of groups or organizations? Will the FCC discriminate against applicants with no group or organizational affiliation?

As the distinction between print and broadcast media continues to blur, how will the Commission decide what is and what is not a "telecommunications facility"? For example, is a videotext operation a telecommunication facility?

Ownership Diversity and the Public Interest in A Random Allocation of Licenses

As efficient as a lottery may be for allocating a license or permit, its effectiveness at securing the best practicable service or promoting ownership diversification -- the two standard comparative issues -- is suspect. Any system of random selection limits the Commission's discretion and inevitably leads important decisions and choices to chance. Notwithstanding the granting of "significant preferences" to "underrepresented owners," the FCC will no longer have the opportunity to decide which applicant will best serve the public interest. The lottery may or may not promote ownership diversification; although the Commission may tip the scale in favor of minority applicants, it cannot decide a priori that, for example, a particular minority applicant would offer the best practicable service to the community and at the same time diffuse telecommunications ownership--ordinarily a compelling combination. It would be difficult to argue that leaving either or both of these factors to chance--regardless of the odds--would be in the public's best interest.

If one of the FCC's "primary responsibilities is to choose among qualified new applicants for the same broadcast facility,"[48] and if "comparative analysis is implicit in any scheme of allocation and has always been at least formally a consideration in broadcast licensing,"[49] then a lottery approach stands out as an administrative aberration, an alarmingly simplistic and wholly inadequate method for selecting applicants and allocating frequencies.

Nonetheless, given that the Commission has been "extraordinarily candid"[50] about its opposition to comparative hearings, it appears likely that it will

exercise its option[51] to use a lottery. Accordingly, we can only hope that the FCC defines "significant preference" in such a way that ownership diversification plays a major role in the administration of its lottery. Beyond the Congressional requirement that the Commission distinguish between "ordinary" and minority applicants, we would further hope that the FCC would discriminate among minority applicants themselves--as illustrated in the second of our two scenarios.

FOOTNOTES

[1]Communications Act of 1934, 47 U.S.C.§ 309.

[2]In Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 329 (1945), the Supreme Court held that the FCC must hold comparative hearings when two or more applicants seek the same frequency.

[3]Douglas H. Ginsburg, Regulation of Broadcasting (St. Paul: West, 1979), pp. 76-77.

[4]Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949). When two or more applicants compete for the same frequency, the Court ruled, "the public interest is served by the selection of the better qualified applicant, and the private interest of each applicant comes into play upon that question. Thus, the comparative hearing is an adversary proceeding. The applicants are hostile, and their respective interests depend not only upon their own virtues but upon the relative shortcomings of their adversaries."

[5]Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). Excerpted in Ginsburg, pp. 94-95.

[6]Ibid. See also Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir. 1951); McCatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir.1956); and U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[7]FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978).

[8]Jacob W. Mayer and Michael Botein, "Ashbacker Rites in Administrative Practice: A Case Study of Broadcast Regulation," New York Law School Law Review, 24 (1978): 480.

[9]Congressional Record, July 29, 1981, p. H5549.

[10]Ibid.

[11]47 CFR §§ 73.37, 73.201, 73.606 (1976).

[12]See: 47 U.S.C. § 308 (b), 47 CFR § 73.24.

[13]Robert A. Anthony, "Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings," Stanford Law Review 24 (1971): 1, 26-27.

[14]326 U.S. 327.

[15]1 FCC 2d. 393, as reproduced in Frank J. Kahn, ed., Documents of American Broadcasting 3d. ed. (Englewood Cliffs: Prentice Hall, 1978), p. 329.

[16]Kahn, Documents, p. 330.

[17]Ibid., pp. 330-331.

[18]Ibid., pp. 332-338.

[19]Glen O. Robinson, "The Federal Communications Commission: An Essay on Regulatory Watchdogs," Virginia Law Review 64 (1978): 169, 238.

[20]"Citizens Committee to Save WEFM v. FCC," Case # 73-1057, D.C. Cir. Sl. Op , pp. 26-27, as cited by Henry Geller, Petition for Issuance of Notice of Inquiry and Proposed Rule Making re. Formulation of Policy or Rules to Simplify and Facilitate Early Determination of Comparative Broadcast Hearings Involving New Applicants Only, (mimeo, n.d.) p. 3.

[21]W.K. Jones, Licensing of Major Broadcast Facilities by the Federal Communications Commission, Administrative Conference of the U.S., Sept., 1962, pp. 198-199, as cited by Geller, Petition for Issuance, p.2.

[22]Geller, Petition for Issuance, Appendix B "Draft Notice," p. 1.

[23]Louis L. Jaffe, "The Scandal in TV Licensing," Harper's, Sept., 1957, p. 79.

[24]Donald Grunewald, "Should the Comparative Hearing Process be Retained in Television Licensing?" American University Law Review 13 (1964) 164, 165.

[25]Anthony, "Towards Simplicity," p. 51.

[26]Some of the inefficiency may be due to seemingly inconsistent or even contradictory goals such as the Commission's preference for applicants who can demonstrate superior previous broadcast station operation and its preference for applicants having no other or previous media holdings.

[27]Geller, Petition for Issuance, Appendix B p.2, n.2, and Anthony, "Towards Simplicity." p. 51, n. 247.

[28]See: Landis, Report on Regulatory Agencies to the President-Elect, Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 86th Cong. 2d. Sess. 53 (1960), Grunewald, "Should the Comparative Hearing," pp. 165-166, and Geller, Petition for Issuance, Appendix A, Appendix B, pp. 1-2.

[29]Anthony, "Towards Simplicity," p.51, n. 273, discussing the findings of W.Jones.

[30]Pike and Fischer, Rad. Reg., Current Digest, see, for example, ¶53:24.

[31]47 CFR §§73.35, 73.240, 73.636.

[32]1 FCC 2d 393.

[33]See, for example, "Cowles Florida Broadcasting, Inc." 60 FCC 2d 372 (1976) pp. 394, 407-416.

[34]Ibid., and p. 422.

[35]Ibid., Dissenting Statement of Chairman Richard E. Wiley, pp. 430-433.

[36]Ibid.

[37]"Central Florida Enterprises, Inc. v. FCC" (D.C. Cir., 1978) 44 Rad. Reg. 2d 345, 364.

[38]Ibid.

[39]"Cowles Broadcasting Inc." 49 Rad. Reg. 2d 1138 (1981).

[40]Ibid. p. 1158.

[41]Christopher Sterling and Timothy Haight, The Mass Media: Aspen Institute Guide to Communication Industry Trends (NY: Praeger 1978), p. 100.

[42]Proceedings of the Symposium on Media Concentration Dec. 14 and 15, 1978, Bureau of Competition, Federal Trade Commission, GPO, p. 187.

[43]Congressional Record, July 29, 1981, p. H 5433.

[44]Ibid.

[45]Ibid.

[46]"Significant Preferences" is defined here as changing the actual ratio of minority applicants to "ordinary" applicants to an effective ratio of minority applicants to "ordinary" applicants, where the latter - the effective ratio - reflects a greater number of minority applicants than "ordinary" applicants.

[47]Minority applicants may be rank-ordered by the Commision on a comparative basis or through the application of objective criteria.

[48]Ginsburg, Regulation of Broadcasting, p. 94.

[49]"Central Florida Enterprises, Inc. v. FCC" 598 F. 2d 37, 41 (D.C. Cir., 1978).

[50]Ibid., p. 50. See also "Cowles Florida Broadcasting, Inc." 60 FCC 2d 430, 433 (Chairman Wiley Dissenting)

[51]The language of the law is such that the Commission "has the authority" to use a lottery; it is not mandated.